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IN THE SUPERIOR COURT

STATE OF ARIZONA, COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ARTHUR RAY,

Defendant.

V1300CR201080049

STATE'S RESPONSE TO DEFENDANT'S
MOTION FOR RECONSIDERATION OF
ORAL RULING TO ADMIT EVIDENCE
OF PRIOR SWEAT LODGE CEREMONIES

(The Honorable Warren Darrow)

The State of Arizona, through undersigned counsel, respectfully files this response to Defendant's Motion for Reconsideration of Oral Ruling to Admit Evidence of Prior Sweat Lodge Ceremonies.

Defendant's motion misstates the record in this matter. From the date of the initial ruling of February 3, 2011, thirteen days prior to the start of trial, this Court has made it clear that the evidence of prior sweat lodge ceremonies at Angel Valley was not admissible for the purposes set forth in Rule 404(b), Ariz. R. Crim. P., as it relates to the charge of manslaughter only. Furthermore, this Court has consistently ruled that the evidence may be relevant and admissible for other purposes. Defendant's argument to the contrary must be rejected. This Response is supported by the following Memorandum of Points and Authorities.

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MEMORANDUM OF POINTS AND AUTHORITIES

Relevant Procedural History:

- On February 3, 2010, the Yavapai County Grand Jury indicted Defendant on three counts of manslaughter for the deaths of victims Kirby Brown, James Shore and Lizbeth Neuman.
- On May 7, 2010, the State informed Defendant of its intent to introduce evidence concerning the prior sweat lodge incidents.
- On July 6, 2010, Defendant filed a motion in limine to exclude “inadmissible evidence of prior acts pursuant to Ariz. R. Evid 404(B) and 403.” The prior acts at issue were Defendant’s previous events and specifically Defendant’s prior sweat lodge ceremonies at Angel Valley Spiritual Retreat Center.
- A three-day hearing was held on Defendant’s motion on November 9, 10 and 16, 2010. During the hearing, the State called multiple witnesses who were present at both the 2009 and prior Spiritual Warrior events. The State also submitted an offer of proof which detailed the interviews of many participants of the 2005, 2007 and 2008 sweat lodge events. Defendant called Caren Wendt, a participant from the 2008 Spiritual Warrior Seminar, who testified that she never saw a single participant suffer from any ill effects following the 2008 sweat lodge ceremony, but admitted she was not focused on others. Ms. Wendt’s testimony conflicted with the statements of other witnesses from the 2008 ceremony who reported seeing people unconscious and vomiting and the testimony of Vicky Rock who cared for an unconscious participant following the event.
- On January 31, 2011, Defendant filed a list of witnesses for trial, listing from prior sweat lodge events, Caren Wendt, Megan Fredrickson and Gary Palisch. Neither Ms. Wendt nor

1 Mr. Palisch were present at the 2009 Spiritual Warrior event. The same date, Defendant
2 filed a list of exhibits for trial. Included on the list were the medical records for Daniel
3 Pfankuch, a 2005 sweat lodge participant who was transported to the hospital following
4 his participation in Defendant's 2005 sweat lodge ceremony.

- 5 • On February 3, 2011, thirteen days prior to the commencement of the trial, the Court
6 issued its Under Advisement ruling. This Court found:

7 [W]ith regard to manslaughter charges, evidence of the similarity of the
8 way in which the sweat lodge and other ceremonies were conducted
9 from year-to-year is not relevant and admissible on the issue of
10 knowledge (i.e., conscious disregard of a known risk) and absence of
11 mistake or accident.

12 The Court noted that it had not addressed the "possible admissibility of the other-act
13 evidence in the context of a lesser-included offense." Finally, the Court ruled that during
14 the State's case-in-chief:

15 [O]ther act evidence relating to the manner of conducting sweat lodge
16 ceremonies and to the physical and mental effects observed in or
17 experienced by participants is not admissible under Rule 404(b) with
18 regard to the charges of manslaughter.

19 *Under advisement ruling on Defendant's Motion in Limine (No. 1) to Exclude*
20 *Inadmissible Evidence of Prior Bad Acts Pursuant to Ariz. R. Evid. 404(b) and 403.*

- 21 • On February 14, 2011, the State filed a Motion for Reconsideration of the Court's
22 February 3, 2011 ruling.
- 23 • Trial commenced on February 16, 2011 with the start of jury selection.
- 24 • On March 1, 2011, prior to opening statements, this Court informed the parties that with
25 respect to the 404(b) context, the evidence was inadmissible and its originally ruling
26 would stand. However, the Court also informed the parties it was aware that there are

1 many instances "outside of the 404(b) context" where the prior sweat lodge ceremonies
2 may be relevant and admissible. Specifically, this Court advised the parties as follows:

3 So outside of the 404(b) context there may be instances where references to
4 other sweat lodge information could be appropriate. And I dealt with the issue
5 as it was given to me, a 404(b) issue of these prior things happened almost in
6 the nature of being prior bad acts. And I don't think that's the only way they
7 could be characterized.

8 *Exhibit A., Partial Transcript, 3/1/11 at 9:10-17.*

- 9 • The following day this Court reaffirmed its ruling that a participant's observations
10 of physical or mental effects that occurred at a prior sweat lodge event would be
11 admissible to the issue of causation.

12 THE COURT: I don't see this as a 404(b) issue. And I mentioned that
13 yesterday at the pretrial. I handled the 404(b) motion on the terms it was given me,
14 and I'm not reconsidering that ruling. That stays.

15 However, there is an issue of causation. And because there is an issue of
16 causation, observations that are based on adequate foundation evidence would be
17 admissible, not the general statements that happened at the 404(b) hearing where
18 people wanted to look at a photo and then say this might have been the condition
19 of somebody.

20 I'm talking about if there is somebody that actually experienced something
21 and has a basis to testify as to what was experienced, that would be admissible on
22 this causation issue. A direct observation of a person. That would be admissible.
23 Something that a layperson could testify about in accordance with Rule 701.

24 What has to be avoided are general statements that try to characterize the
25 whole event or the post event. That has to be avoided.

26 If you look at 404(b), it's concerned with character evidence. And it talks
about exceptions if the evidence is offered for a different purpose. And you look at
the purpose that are listed – the purposes that are listed, and they're not exclusive.

But it's motive, opportunity, intent, preparation, plan, knowledge, identity,
or absence of mistake or accident. So the rule is concerned with having general
character evidence come in instead of evidence that really talks about some type of
specific characteristics of a person's conduct.

1 This testimony that the state's proposing, as I see it, has nothing to do with
2 that. It has to do with what kind of physical or mental effects occurred at prior
3 sweat lodge events, and that's it. It doesn't have anything to do with something
4 that bears on somebody's intent, or it cannot anyway.

Exhibit B., Partial Trial Transcript, 3/2/11, at 33:10-35:2.

- 5 • Later during the same argument, this Court noted that a prior participant's observations
6 and knowledge of what had occurred in previous sweat lodge ceremonies might be
7 admissible to aid in understanding how the participant interpreted the 2009 sweat lodge.

8 *Id. at pg. 42:17-24.*

- 9 • Throughout the preceding weeks of this trial, this Court has consistently ruled in
10 conformance to this initial guidance provided to the parties. Following the testimony of
11 Jennifer Haley on March 9, 2011, this Court again explained the basis for its ruling:

12 One potential not-404(b) purpose is related to causation. I made that
13 determination. I can see that may be relevance to that question.

14 However, I conclude that until there is expert testimony indicating that
15 evidence of medical effects of prior events is relevant evidence, then the evidence
16 should not be offered for that purpose.

17 I talked about conditional admission under Rule 104, specifically Rule
18 104(b). But the risk there would be that a lot of this evidence would come in and it
19 would never be tied to causation. The old cart-before-the-horse analogy.

20 So that's what I've -- that's my determination, and that's what people need
21 to know for today.

22 Another -- I want to talk about the testimony of Jennifer Haley, just as an
23 example. She testified about a prior sweat lodge event that she participated in, and
24 that could have independent basis for admissibility. Not just the causation
25 question. But it does raise the issue of what can happen with imprecise testimony
26 about the effects of a prior sweat lodge.

She testified, in her opinion, needed to go to the hospital. Just potentially
very prejudicial testimony.

However, the testimony regarding the prior sweat lodge had other
relevance beside effect on the one participant she talked about.

1 There was a bench conference regarding Ms. Haley, and there was an
2 indication that the state wanted to question about the knowledge of Mr. Ray
3 concerning that effect on that participant.

4 There was actual testimony to that effect anyway, and it was not objected
5 to. And I think it had a basis for admissibility. It came up in another context in
6 Miss Haley's testimony. However, at bench it was indicated that the relevance of
7 knowledge of Mr. Ray would be that he would know that it was the heat. And
8 that's not pertinent to the issue of causation.

9 So right now I've acknowledged that there are some non-404(b) grounds
10 for admissibility, and these, essentially, have been urged by the state. One I
11 discussed at the pretrial conference on March 1 at the start. And that is as rebuttal
12 if there is an inaccurate portrayal of state of knowledge by Mr. Ray. That was one.

13 The other that has come up is causation. But I've determined that it's not
14 going to be appropriate to admit evidence conditionally under 104(b). That there
15 would have to be expert testimony that would indicate that evidence of effects of
16 prior sweat lodge events is relevant to the issue of causation.

17 And then there has just been a discussion throughout about what is relevant
18 to the state of mind or a participant and what was done by a participant or by one
19 of the alleged victims.

20 *Exhibit C, Partial Trial Transcript, 3/9/11 at 5:24 – 8:9.*

21 **Legal Argument:**

22 **A. This Court has never reversed its ruling on the admissibility of prior sweat lodge events.**

23 As noted above, this Court has repeatedly emphasized to the parties that evidence of the
24 prior sweat lodge events is not admissible pursuant to Rule 404(b), Ariz. R. Evid., but that it may
25 be admissible for several other relevant purposes. Included in these other relevant purposes are
26 causation, the mindset of the participants, and to rebut an inaccurate portrayal of Defendant's
state of mind. All of these purposes are critical to ensure that the jury receives an accurate
portrayal of the facts of this case. This Court has stressed the non-404(b) purposes for which this
evidence is admissible and the State has complied with this Court's order.

1 Defendant's claim that he is prejudiced from this Court's rulings because he prepared his
2 defense and trial strategy "focused exclusively on the 2009 events" is clearly not supported by
3 this record. The Court's initial ruling on the admissibility of the prior sweat lodge events under
4 404b was not issued until February 3, 2011, less than two weeks prior to the start of trial.
5 Defendant's list of witnesses was filed on January 31, 2011, *prior* to this Court's initial ruling,
6 and identified three witnesses who would possibly testify about prior sweat lodge ceremonies,
7 Caren Wendt, Megan Fredrickson and Gary Palisch. Neither Caren Wendt nor Gary Palisch were
8 present in 2009. In addition, Defendant included Daniel Pfankuch's medical records on its initial
9 list of exhibits. Clearly, Defendant was preparing for the possibility that this Court would allow
10 this evidence.
11

12 The State asked this Court to reconsider its ruling prior to the start of trial, and that motion
13 was pending up until the start of testimony. Defendant's claim that "every aspect of his defense
14 would have changed" is belied by the record.
15

16 **B. This Court has correctly ruled that the prior sweat lodge events are relevant and**
17 **admissible for other purposes.**

18 **1. Mindset and conduct of participants, and construction of sweat lodge**

19 While evidence of Defendant's prior sweat lodge ceremonies is not admissible under Rule
20 404b, this Court has correctly noted the relevance for other purposes. The history of Defendant's
21 Spiritual Warrior events and the prior sweat lodge events are relevant to the state of mind and
22 conduct of participants and those assisting. Multiple trial witnesses at trial who were present for
23 the 2009 event also participated in Defendant's prior sweat lodge events, including victim Lizbeth
24 Neuman. The prior experiences of Jennifer Haley and Lisa Rondan are directly relevant to their
25 reluctance to be inside the sweat lodge in 2009. The prior experience of Mark Rock is relevant as
26 to why he knew to lift the edge of the sweat lodge while the flap was open. The prior events are

1 also relevant to the size of the sweat lodge and the way it was constructed and covered in 2009. It
2 relates to the mental state of Mercers and the Hamiltons during 2009 and why Debra Mercer was
3 concerned and apprehensive during the 2009 event.

4 **2. Causation: The prior sweat lodge ceremonies are relevant to show Defendant**
5 **caused the victims' death.**

6 The prior sweat lodge events are directly relevant to the issue of whether Defendant's
7 actions in conducting the sweat lodge ceremony caused the victims' death. They are also directly
8 relevant to rebut Defendant's defense that an unforeseen event caused the victims' death.

9 **(a) Elements of manslaughter**

10 The crime of manslaughter, A.R.S 13-1103(A)(1), requires proof that:

- 11 (1) Defendant caused the death of another person;
- 12 (2) Defendant was aware of and showed a conscious disregard of a substantial and
13 unjustifiable risk of death; and
- 14 (3) that the risk was such that disregarding it was a gross deviation from the standard of
15 conduct that a reasonable person would observe in that situation.

16 **(b) Causation**

17 Contrary to the repeated assertions of Defendant, the State need not prove that *heat* killed
18 the victims. The law requires the State to prove that Defendant caused their deaths, not the
19 medical cause of their deaths.

20 Arizona Revised Statutes section 13-203(A)(1) provides:

21 Conduct is the cause of a result when both of the following exist:

- 22 (1) But for the conduct the result in question would not have occurred.
- 23 (2) The relationship between the conduct and result satisfies any additional
24 causal requirement imposed by the statute defining the offense.

1 Because the statutes defining manslaughter and negligent homicide do not contain any additional
2 causal requirements, causation is determined by the “but for” test of A.R.S. § 13-203(A)(1). *See*
3 *Napolitano v. Gravano*, 204 Ariz. 106, 116, 60 P.3d 246, 256 (App. 2002).

4 **(c) “But for” test and proximate cause**

5 Under Arizona law, the State must prove that Defendant’s reckless conduct proximately
6 and in fact caused the deaths of the three victims in this case. Under the “but for” (or cause-in-
7 fact) requirement of A.R.S. 13-203(A)(1), there must be some evidence that but for Defendant’s
8 conduct, the tragedy and resulting deaths would not have occurred. As explained below, the
9 evidence need not show that Defendant’s conduct was the only cause of the tragedy at Angel
10 Valley; the State must prove that the tragedy and resulting deaths would not have occurred absent
11 Defendant’s conduct. To show proximate cause, the State must show that the difference between
12 the result intended by Defendant and the harm actually suffered is not so extraordinary that it
13 would be unfair to hold Defendant responsible for the result. Under Arizona law, proximate cause
14 may be interrupted where another cause with which a defendant is in no way connected
15 intervenes, and but for which death would not have occurred. Arizona law is clear the State is not
16 required to show that a specific result or injury is foreseeable by the defendant in order to impose
17 criminal liability.

18 “To establish legal cause, or cause-in-fact, there must be some evidence that *but for*
19 defendant’s conduct, the accident and resulting death would not have occurred.” *State v. Marty*,
20 166 Ariz. 233, 236, 801 P.2d 468, 471 (App. 1990) (emphasis added). “In Arizona, both ‘but for’
21 causation and proximate cause must be established in a criminal case.” *Id.* citing *State v. Lawson*,
22 144 Ariz. 525, 540, 698 P.2d 1244, 1259 (1985).

23 “Proximate cause is shown “by demonstrating a natural and continuous sequence
24 of events stemming from the defendant’s act or omission, unbroken by any
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1 efficient intervening cause, that produces an injury, in whole or in part, and
2 without which the injury would not have occurred.” *Barrett v. Harris*, 207 Ariz.
3 374, 378, ¶ 11, 86 P.3d 954, 958 (App.2004). Proximate cause requires that the
4 difference between the result intended by the defendant and the harm actually
5 suffered by the victim “is not so extraordinary that it would be unfair to hold the
6 defendant responsible for the result.” *State v. Marty*, 166 Ariz. 233, 237, 801
7 P.2d 468, 473 (App.1990) (citation omitted) (defendant guilty of manslaughter by
8 giving drugs and alcohol to sixteen-year old driver who subsequently died in an
9 accident when the defendant made no effort to discourage victim from driving and
10 it was foreseeable that a driver under the influence would be unable to drive
11 safely). ***Thus, it is not necessary to show that a specific result or injury is
12 foreseeable by the defendant in order to impose criminal liability.***

13 *State v. Far West Water & Sewer Inc.*, 224 Ariz. 173, 193-194, 228 P.3d 909, 929 -
14 930 (App. 2010) (emphasis added).

15 Evidence from prior sweat lodge events, whether conducted by Defendant or conducted
16 by others, is relevant to prove it is Defendant’s use of heat and the conditions he created inside
17 the sweat lodge that caused the deaths of the three victims. It is Defendant who caused the deaths
18 of Kirby Brown, Lizbeth Neuman and James Shore by placing them into the sweat lodge and
19 subjecting them to a heat endurance challenge which he alone controlled. Defendant alone
20 controlled the heat inside the lodge, the length of the rounds, the number of rounds, the length of
21 the ceremony, the length of time the door was opened between rounds, and the amount of water
22 introduced to create the searing heat. It was Defendant who challenged and encouraged his
23 participants to ignore the body’s signs and symptoms of heat stroke in order to achieve “an
24 altered experience.” Finally, it was Defendant who continued the sweat lodge event after a
25 participant was burned, after a participant believed he was having a heart attack, after he observed
26 multiple participants being dragged out, after he was told Lizbeth Neuman was having problems,
after James Shore dragged the unconscious Sydney Spencer to the door before the start of the
final round, and after he was told Kirby Brown was not breathing. It was Defendant who

1 proclaimed that the victims should be left in place until after the final round, knowing they were
2 not breathing.

3 The fact that it is only in Defendant's sweat lodge events that participants suffer any signs
4 or symptoms of any kind of physical or mental distress, regardless of the construction of the
5 sweat lodge or the number of participants, is relevant to prove that it is Defendant's conduct
6 caused the victims' death. As the State has now presented expert testimony from multiple medical
7 witnesses that the signs and symptoms of physical or mental distress observed during the prior
8 sweat lodge ceremonies are consistent with the signs and symptoms of heat-related illnesses, the
9 evidence is admissible.

11 **d. Intervening/supervening cause of death**

12 Defendant has argued to this Court that the State must prove that some intervening event
13 did not cause the deaths of the victims. "Proximate cause may be interrupted where another cause
14 'with which the defendant was in no way connected intervenes, and but for which death would
15 not have occurred.'" *Marty, supra*, 166 Ariz. at 237, 801 P.2d at 472. The State must prove that
16 "defendant's action 'in a natural and continuous sequence, unbroken by any efficient intervening
17 cause, produces the injury, and without which the result would not have occurred.' *Black's Law*
18 *Dictionary*, 1103 (Rev.5th Ed.1979)." *State v. Wiley*, 144 Ariz. 525, 540, 698 P.2d 1244, 1259
19 (1985), overruled on other grounds by *State Through Criminal Div. of Attorney Gen.'s Office v.*
20 *Superior Court In & For Maricopa County*, 157 Ariz. 541, 760 P.2d 541 (1988).

21 An intervening event "is one which intervenes between defendant's negligent act and the
22 final result and is a necessary component in bringing about that result." *Rossell v. Volkswagen of*
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1 *America*, 147 Ariz. 160, 168, 709 P.2d 517, 525 (1985).¹ If the defendant's "negligent course of
2 conduct (as distinguished from the risk of harm created) actively continues up to the time the
3 injury is sustained, then any outside force which is also a substantial factor in bringing about the
4 injury is a concurrent cause of the injury and never an 'intervening' force." *Zelman v. Stauder*, 11
5 Ariz. App. 547, 550, 466 P.2d 766, 769 (1970). An intervening force is not a superseding cause
6 "if the original actor's negligence creates the very risk of harm that causes the injury" or
7 "increases the foreseeable risk of a particular harm occurring through . . . a second actor." *State v.*
8 *Slover*, 220 Ariz. 239, 244, 204 P.3d 1088, 1093 (App. 2009) (internal quotation marks and
9 citations omitted).

11 In *Slover*, the defendant was driving while intoxicated on a rural highway at night. The
12 truck left the road and rolled down an embankment landing on its roof and hood over a shallow
13 creek. *Id.* at 242, 204 P.3d at 1091. The passenger was found dead, lying in the creek with his
14 head submerged in water. The victim's blood alcohol concentration was .231 at the time he died.
15 Slover was charged with manslaughter, DUI and driving with a blood alcohol level of .08 or
16 more. Both the medical examiner who performed the autopsy and the defendant's expert witness
17 agreed that the cause of the victim's death was asphyxiation caused by drowning and blunt force
18 injuries of the head. *Id.* at 244, 204 P.3d at 1093. The medical examiner who performed the
19 autopsy testified that the cause of drowning was a loss of consciousness due to a head injury. The
20 defendant's expert witness, the Chief Medical Examiner of Yavapai County, disagreed with the
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25 ¹ Citation to civil cases is appropriate here. See *State v. Bass*, 198 Ariz. 571, 576, 12 P.3d 796,
26 801 (200) (adopting the tort standard for superseding cause as the criminal standard); see also
State v. Slover, 220 Ariz. 239, 244, 204 P.3d 1088, 1093 (App. 2009) (citing civil cases including
Rossell in discussion of necessity of superseding cause instruction.).

1 conclusion that the victim had been unconscious when he suffocated. He testified it was "possible
2 for someone to be conscious but intoxicated enough to drown and concluded the victim's blood
3 alcohol concentration was high enough that it could have prevented him from taking his head out
4 of the water." *Id.* At trial, the defendant requested a jury instruction on superseding cause,
5 asserting it was supported by the evidence. The trial court refused the instruction finding "it was
6 irrelevant whether the victim had gotten out of the truck on his own or been ejected, that Slover's
7 actions had placed the victim 'in a situation where reasonably he could not have extracted
8 himself' which precluded the superseding cause instruction." *Id.*

10 On review, the Court of Appeals agreed and noted the following:

11 Even assuming the latter testimony [of the defendant's expert] was sufficient to
12 establish a potential intervening cause for the victim's death, it could not constitute
13 a superseding cause to relieve Slover of liability. Slover's conduct of driving while
14 intoxicated was the very reason the victim had ended up near or in a creek,
15 intoxicated, with head injuries, and at the very least, increased the foreseeable risk
16 that the victim would die in the accident.

15 *Id.*

16 Evidence of prior sweat lodge ceremonies conducted at Angel Valley both by Defendant
17 and other facilitators is relevant and necessary to rebut Defendant's defense that some intervening
18 superseding cause was responsible for the victims' death and not Defendant. Defendant has
19 argued that some unknown toxin or poison was present in the sweat lodge and that this, and not
20 Defendant's conduct, caused the victims' death. Defendant may also argue the design of the
21 sweat lodge, the off-center pit, or the build-up of carbon dioxide in the sweat lodge from the
22 breathing of the participants are intervening events relieving Defendant of criminal responsibility
23 in this case.
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1 Should Mr. Rick Haddow, the environmental engineer whose preliminary opinions set
2 forth in an email became the subject of a motion for mistrial, testify in this case, he would offer
3 the following opinions:²

- 4 • The presence of carbon dioxide inside the sweat lodge was caused by the breathing of the
5 participants, not an external non-human contributor;
- 6 • The materials used to construct the sweat lodge did not create the carbon dioxide inside
7 the sweat lodge;
- 8 • The process of heating the rocks to created glowing red rocks (used to heat the sweat
9 lodge) would eliminate the presence of any possible toxins on the rocks, and toxins did
10 not contribute to the deaths of the three victims;
- 11 • The radiant heat from the pit filled with heated rocks created a barrier that prevented
12 circulation of air; and the heat barrier would have been greater if the pit had been exactly
13 in the center of the sweat lodge;
- 14 • The amount of rocks inside the pit inside the sweat lodge caused the radiant heat barrier;
- 15 • The amount of rocks in the pit inside the sweat lodge caused the problems, not the off-
16 center location of the pit;
- 17 • Those participants seated in the back part of the sweat lodge, away from the door,
18 experienced greater heat than those near the door;
- 19 • Those participants seated closer to the off-center pit experienced more heat than those
20 further away;
- 21 • Steamy heat such as that created by Defendant is more dangerous than dry heat along
22 because water holds more energy;
- 23 • Many factors contributed to the deaths of the three victims including: the heat; the number
24 of rocks; the temperature of the rocks; how much water added to the rocks; the number of
25 participants; the respiration rates, exertion level, size and lung capacity of participants; the
26 length of time each participant spent in the sweat lodge; the length of time the door was
opened between rounds; the number of rounds; the length of the ceremony; the carbon
dioxide build-up as a result of the breathing and exhaling of participants, the impaired

² Mr. Haddow was interviewed by the parties on April 15, 2011. During that interview, Mr. Haddow explained he had sent the April 29, 2010 email (which was the subject of the mistrial motion) on his own and not at the request of the State. Mr. Haddow also confirmed he had never been retained or paid any money by the State.

1 cognitive functions of participants; and their condition as they entered the sweat lodge
2 including their participation in the Vision Quest;

- 3 • The design features of this particular sweat lodge were ideal for the Defendant if his
4 intention was to run the hottest sweat lodge ever;
- 5 • That structures such as this sweat lodge do not need permits in Maricopa County;
- 6 • Cramming 70 participants into the sweat lodge and keeping them inside for two hours
7 without opening the door would create a risk of death due to possible carbon dioxide from
8 their breathing even without the introduction of heat;
- 9 • Heat and hypercapnia (an increased amount of carbon dioxide in the blood) caused organs
10 to fail, leading to the death of the victims.³

11 The same sweat lodge, with the same coverings and the pit in exactly the same location,
12 was previously used in other sweat lodge ceremonies in 2008 and 2009, but it was only in
13 Defendant's ceremonies that participants showed any signs of physical or mental distress.
14 Similarly, prior sweat lodge ceremonies took place in other sweat lodge structures of different
15 sizes and different construction, but it was only in the events controlled by Defendant that
16 participants showed any signs of physical or mental distress. This evidence is relevant to rebut
17 Defendant's claims of intervening causes of death.

18 In the instant case, it was Defendant's conduct in controlling the sweat lodge that
19 produced the heat, the humidity and the air quality within the lodge. It was Defendant's conduct
20 over the course of the week that determined the mindset of the participants within the lodge. It
21 was Defendant who told the participants that they would experience the signs and symptoms of
22 heat exhaustion to the point of achieving an altered state and they should "play full on" and
23 ignore these signs. Finally, it was Defendant who continued the sweat lodge event after a
24 participant was burned, after a participant believed he was having a heart attack, after he observed
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26 ³ The State has submitted the entire audio recording of the April 16, 2011 interview of Rick Haddow as an exhibit. It is marked as Exhibit No. 894.

1 multiple participants being dragged out, after he was told Lizbeth Neuman was having problems,
2 after James Shore dragged the unconscious Sydney Spencer to the door before the start of the
3 final round, and after he was told Kirby Brown was not breathing. Given these facts, evidence of
4 prior sweat lodge ceremonies at Angel Valley is relevant to prove it was Defendant, and not an
5 intervening act, that caused the victims' deaths.

6
7 **3. The prior sweat lodge events are relevant to explain the course of the investigation.**

8 In addition to causation, Defendant is challenging the investigation conducted by the
9 Yavapai County Sheriff's Office. The jury has repeatedly heard argument from Defendant's
10 counsel that additional testing should have occurred and that the investigation immediately
11 focused on Defendant without searching for other possible causes of death. Evidence of the prior
12 sweat lodge events, including those conducted by Defendant and others not conducted by
13 Defendant, is relevant to explain the progress of the criminal investigation. The information
14 learned by detectives that participants exhibited signs of physical or mental distress only at
15 ceremonies conducted by Defendant was a significant factor in the investigation. In attempting to
16 confirm this fact, detectives actively sought out participants from other events and verified this
17 information which was initially provided by the Mercers and the Hamiltons. The confirmation of
18 this fact through the interviews of prior participants contributed to the decision that additional
19 testing was not necessary, and to the conclusion it was Defendant's actions in conducting the
20 sweat lodge event that caused the deaths of Kirby Brown, James Shore and Lizbeth Neuman.
21 Without this information, the investigation would have followed a different course.

22
23 **Conclusion:**

24
25 This Court has consistently ruled that the prior sweat lodge evidence may be relevant and
26 admissible for purposes other than those set forth in Rule 404(b), Ariz. R. Crim. P. Defendant's

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1 claim that on April 6, 2011, this Court somehow reversed its prior ruling and caused great prejudice
2 to Defendant is not supported by the extensive record this Court has created on this issue. The prior
3 sweat lodge events are relevant and admissible for multiple purposes. They explain the mindset and
4 the actions of the prior participants during the 2009 ceremony. They explain the reason for the size
5 of the lodge and the history of its construction including the addition of the plastic tarps and rubber
6 covering to increase the heat inside the lodge at the request of Defendant. The prior events are
7 relevant to prove Defendant's conduct caused the victims' deaths, and to rebut Defendant's claim of
8 an intervening cause. Finally, the prior sweat lodge events help explain the course of the
9 investigation and why the investigators reached the conclusion that it was Defendant who is
10 responsible, and not an unknown toxin, the location of the pit or the coverings on the lodge.

12 Accordingly, this Court should deny Defendant's motion for reconsideration.

13 RESPECTFULLY submitted this 20th day of April, 2011.

17 By Sheila Sullivan Polk

18 SHEILA SULLIVAN POLK
19 YAVAPAI COUNTY ATTORNEY

19 COPIES of the foregoing delivered this 20th
20 day of April, 2011."

21 Hon. Warren Darrow
22 Judge of the Superior Court

23 Thomas Kelly

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26 355 S. Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560

By: Kelly Durrer

By: _____

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4 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
5 FOR THE COUNTY OF YAVAPAI
6
7 STATE OF ARIZONA,)
8 Plaintiff,)
9 vs) Case No. V1300CR201080049
10 JAMES ARTHUR RAY,)
11 Defendant.)
12
13
14 REPORTER'S TRANSCRIPT OF PROCEEDINGS
15 BEFORE THE HONORABLE WARREN R DARROW
16 TRIAL DAY TWELVE
17 MARCH 9, 2011
18 Camp Verde, Arizona
19 (Partial transcript)
20
21
22
23
24 REPORTED BY
25 MINA G. HUNT
AZ CR NO. 50619
CA CSR NO. 8335
Mina G. Hunt (928) 554-8522

3
1 Proceedings had before the Honorable
2 WARREN R. DARROW, Judge, taken on Wednesday,
3 March 9, 2011, at Yavapai County Superior Court,
4 Division Pro Tem B, 2840 North Commonwealth Drive,
5 Camp Verde, Arizona, before Mina G. Hunt, Certified
6 Reporter within and for the State of Arizona.
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1 P R O C E E D I N G S
2 (Partial transcript -- discussions held
3 out of presence of jury and sidebar conferences.)
4 THE COURT: On the record in State versus
5 James Arthur Ray, with Mr. Ray and the attorneys
6 present. The jury is not present.
7 I just wanted to go over 404(b) again. I
8 wanted to revisit that. Now that I've heard some
9 testimony, I think it's necessary to provide some
10 additional guidance.
11 Let me go back to the original ruling
12 where I held that prior sweat lodge events and
13 medical effects of those events are not admissible
14 to show knowledge or conscious disregard on
15 manslaughter charges. That was the essential
16 ruling.
17 By operation of Arizona law, the
18 defendant would be on notice of the charge of
19 negligent homicide. I've indicated I believe that,
20 had the charge been negligent homicide only, that
21 much of this evidence would have been admissible
22 under 404(b).
23 I believe there still would have been the
24 need for medical testimony, for example -- and I'm
25 not saying this is some kind of an issue, but just
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1 to give an example of what I'm talking about, if
2 there was some duty to inquire about medical
3 effects, had there been inquiry, what would have
4 been learned? Just as an example.

5 But the charge was not just negligent
6 homicide. And as a result of that, the 403 factor
7 comes in because of the charge of manslaughter.
8 And I determined that it's not appropriate to allow
9 evidence under 404(b) that would apply only to the
10 lesser included negligent homicide charge but not
11 to the manslaughter charge.

12 The risk of prejudice would just be too
13 great to have that in place. And I didn't see any
14 further briefing on that.

15 The ruling that I issued did not cover
16 admissibility for non-404(b) purposes. If the
17 evidence -- if the information is disclosed
18 properly, then it can be offered in good faith for
19 a non-404(b) purpose. And my ruling would not have
20 changed that in any way. That would just be the
21 typical posture of any case where there are
22 objections or motions in limine that come up during
23 trial.

24 One potential non-404(b) purpose is
25 related to causation. I made that determination.

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1 I can see that there may be relevance to that
2 question.

3 However, I conclude that until there is
4 expert testimony indicating that evidence of
5 medical effects of prior events is relevant
6 evidence, then the evidence should not be offered
7 for that purpose.

8 I talked about conditional admission
9 under Rule 104, specifically 104(b). But the risk
10 there would be that a lot of this evidence would
11 come in and it would never be tied to causation.
12 The old cart-before-the-horse analogy.

13 So that's what I've -- that's my
14 determination, and that's what people need to know
15 for today.

16 Another -- I want to talk about the
17 testimony of Jennifer Haley, just as an example.
18 She testified about a prior sweat lodge event that
19 she participated in, and that could have
20 independent basis for admissibility. Not just the
21 causation question. But it does raise the issue of
22 what can happen with imprecise testimony about the
23 effects of a prior sweat lodge.

24 She testified, in her opinion, needed to
25 go to the hospital. Just potentially very

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1 prejudicial testimony.

2 However, the testimony regarding the
3 prior sweat lodge had other relevance besides the
4 effect on the one participant she talked about.

5 There was a bench conference regarding
6 Ms. Haley, and there was an indication that the
7 state wanted to question about the knowledge of
8 Mr. Ray concerning that effect on that participant.

9 There was actually testimony to that
10 effect anyway, and it was not objected to. And I
11 think it had a basis for admissibility. It came up
12 in another context in Miss Haley's testimony.

13 However, at bench it was indicated that
14 the relevance of knowledge of Mr. Ray would be that
15 he would know that it was heat. And that's not
16 pertinent to the issue of causation.

17 So right now I've acknowledged that there
18 are some non-404(b) grounds for admissibility, and
19 these, essentially, have been urged by the state.

20 One I discussed at the pretrial conference on
21 March 1 at the start. And that is as rebuttal if
22 there is an inaccurate portrayal of state of
23 knowledge by Mr. Ray. That was one.

24 The other that has come up is causation.
25 But I've determined that it's not going to be

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1 appropriate to admit evidence conditionally under
2 104(b). That there would have to be expert
3 testimony that would indicate that evidence of
4 effects of prior sweat lodge events is relevant to
5 the issue of causation.

6 And then there has just been a discussion
7 throughout about what is relevant to the state of
8 mind of a participant and what was done by a
9 participant or by one of the alleged victims.

10 I also wanted to mention with regard to
11 questioning witnesses -- and I'm noting the length
12 of the testimony of witnesses. And the Court will
13 certainly assist, if requested, by either counsel
14 if questions are not being answered.

15 I don't like to interject myself into a
16 proceeding. I prefer not to do that. But I'm
17 going to just to fulfill my responsibility to make
18 sure the trial proceeds in a reasonable manner.

19 So the parties can ask me to assist if a
20 witness is not answering a question.

21 With regard to the disclosure question
22 that came up yesterday, which I think is a serious
23 matter, do you have additional authority on that,
24 Ms. Do?

25 MS. DO: I do, Your Honor. Thank you very

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14 REPORTER'S TRANSCRIPT OF PROCEEDINGS
15 BEFORE THE HONORABLE WARREN R. DARROW
16 TRIAL DAY SEVEN
17 MARCH 1, 2011
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19 (Partial transcript.)
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AZ CR NO. 50619
CA CSR NO. 8335

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2 WARREN R. DARROW, Judge, taken on Tuesday, March 1,
3 2011, at Yavapai County Superior Court, Division
4 Pro Tem B, 2840 North Commonwealth Drive,
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1 P R O C E E D I N G S

2 (Partial transcript -- discussions held
3 out of presence of jury and sidebar conferences.)
4 THE COURT: We are on the record in the
5 State of Arizona versus James Arthur Ray, with
6 Mr. Ray present represented by Mr. Li, Mr. Brian
7 and Ms. Do. And the state is represented by
8 Mr. Hughes and Ms. Polk.

9 We can continue with the pretrial. There
10 was a juror who called in and was -- his wife
11 called in. He was very ill, feels better and is on
12 his way. So we should have the full complement of
13 the jurors who can be sworn in when we start the
14 actual trial session.

15 But I just wanted to conduct pretrial at
16 this time.

17 And, Lionel, if you would help me out and
18 distribute some preliminary instructions.

19 And also I've got some copies of the
20 indictment in the form that the clerk will read the
21 charges. I would like you to look at those now.
22 There were some suggestions for changes that were
23 made by the defense. And some of them were
24 appropriate, in my view.

25 I want you to make whatever records you
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1 evidence that doesn't directly relate to the
2 manslaughter and the issue of knowledge and notice
3 in the manslaughter context.

4 I also mentioned that some of this
5 evidence seems to be uncontested. By that I don't
6 just mean it's uncontested but not relevant. It
7 appears to me that it's discussed that it's
8 something that's just going to be part of this
9 trial.

10 22 19AM

10 So outside of the 404(b) context there
11 may be instances where references to other sweat
12 lodge information could be appropriate. And I
13 dealt with the issue as it was given to me, a
14 404(b) issue of these prior things happened almost
15 in the nature of being prior bad acts. And I don't
16 think that's the only way they could be
17 characterized.

10 23 00AM

18 I want to make clear that if there is
19 testimony about level or there is evidence
20 presented concerning the level of Mr. Ray's
21 knowledge and that's given in the context of the
22 defense case, there may be evidence in the form of
23 rebuttal regarding that.

24 And I think, Mr. Li, you know what I'm
25 talking about. If there is a characterization of
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1 the level of knowledge concerning what happens in
2 these activities, I could see that -- I don't like
3 to use the phrase "opening the door." I think
4 everyone can get a graphic image of that. That's a
5 possibility.

6 Right now my original ruling, 404(b), it
7 stands with regard to just having evidence come in
8 to show this for the purpose of showing this
9 allegedly repetitive recklessness.

10 23 55AM

10 MR. LI: Your Honor, I appreciate the Court's
11 ruling. If I could just get some clarification so
12 that I don't inadvertently step into some problem.
13 Is the Court saying obviously it's -- one of the
14 defenses here is that Mr. Ray did not know that
15 people were dying. Otherwise he would have stopped
16 the event. That has been consistent throughout
17 this case.

10 24 32AM

18 We would not view that as a discussion
19 about prior sweat lodges. We would just be looking
20 at 2009 and saying here's the evidence in 2009.
21 Here's all the evidence that shows Mr. Ray in 2009
22 did not know what was happening.

23 That is not a reference to prior
24 incidents. And we just want to make absolutely
25 clear that that is an element of the defense --

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1 we're not going to be referencing prior sweat
2 lodges as a basis for the fact that he didn't know
3 what was happening in 2009. If we do that, I
4 assume that we will be complying with the Court's
5 order.

6 If I may just be clear. He's charged
7 with knowingly disregarding substantial and
8 unjustifiable risk of death. And Mr. Ray is -- his
9 defense, among others, is going to be that he did
10 not knowingly disregard that. Because he didn't
11 know it was happening. And I, think, frankly,
12 nobody knew it was happening.

13 THE COURT: Ms. Polk?

14 MS. POLK: Your Honor, I think that is exactly
15 the issue why the prior sweat lodge events are
16 relevant. What Mr. Li is suggesting is a mechanism
17 to deliberately mislead the jury about the level of
18 the defendant's knowledge. I understand the
19 Court's ruling. I will abide by the Court's
20 ruling.

10 25 52AM

21 But to give the defense this blanket
22 permission right now to start talking about the
23 defendant's level of knowledge, that he had no
24 knowledge that people were dying, for example, I
25 think would be unfair. And it would allow them to

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1 go down a path of misleading the jury about the
2 level of the defendant's knowledge and what his
3 knowledge meant and what the information that he
4 has, that he's processing at the time -- what they,
5 as the trier of fact, can conclude as to whether or
6 not it's reckless.

7 MR. LI: Your Honor, the defendant, Mr. Ray,
8 has a right to defend against each element of the
9 charge. And simply denying that there was
10 knowledge that in 2009 three people were actually
11 dying does not open the door to prior incidents.

10 26 35AM

12 For all the reasons that are in the
13 Court's ruling, in the Court's 404(b) ruling, the
14 evidence that the state adduced at the three days
15 of hearings with live witnesses -- and I was
16 incorrect. There were actually six witnesses who
17 testified at that event -- is that there were --
18 people did exhibit symptoms, but that these
19 symptoms -- this is the Court's ruling. I don't
20 have it in front of me. That these symptoms did
21 not -- would not lead a reasonable person to think
22 that they were at risk of dying.

10 27 10AM

23 None of the people, including this Daniel
24 P., exhibited symptoms that were in any way
25 considered life threatening.

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17 TRIAL DAY EIGHT
18 MARCH 2, 2011
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1 P R O C E E D I N G S
2 (Partial transcript -- discussions held out of
3 presence of jury and sidebar conferences.)
4 THE COURT: We're on the record in the
5 State of Arizona versus James Arthur Ray, who is
6 present with his attorneys Mr. Li and Ms. Do. The
7 state is represented by Ms. Polk and Mr. Hughes.
8 And this is the time to discuss some pretrial
9 matters.
10 Counsel?
11 MS. POLK: Good morning, Your Honor. Thank
12 you. The state is renewing their request, the
13 motion to reconsider the admissibility of the
14 404(b) acts for the following reasons, Your Honor:
15 The state believes that Mr. Li in his
16 opening has clearly opened the door for this
17 information to come in. When Mr. Li was addressing
18 the jury for many, many minutes on end, he talked
19 to the jury -- suggested to the jury that the state
20 had ignored other possible causes of death, said
21 that the state had ignored the possibility of
22 poisoning from chemicals, from products that were
23 used to construct the sweat lodge such as the tarp.
24 He suggested that the state had ignored
25 the possibility of soil from inside the sweat lodge

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1 medical distress. The Court was here. That person
2 looks like they're in medical distress, and then
3 you show pictures of the same person doing this.
4 That's not admissible, Your Honor. And the Court's
5 ruling was well-founded.

6 THE COURT: Thank you, Mr. Li.

7 Ms. Polk, I want to make a ruling that if
8 you think Mr. Li has brought something up that you
9 need to address. Let's do it that way.

09:36 43AM

10 I don't see this as a 404(b) issue. And
11 I mentioned that yesterday at the pretrial. I
12 handled the 404(b) motion on the terms it was given
13 me, and I'm not reconsidering that ruling. That
14 stays.

09:37 16AM

15 However, there is an issue of causation.
16 And because there is an issue of causation,
17 observations that are based on adequate foundation
18 evidence would be admissible, not the general
19 statements that happened at the 404(b) or were
20 given at the 404(b) hearing where people wanted to
21 look at a photo and then say this might have been
22 the condition of somebody.

23 I'm talking about if there is somebody
24 that actually experienced something and has a basis
25 to testify as to what was experienced, that would

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1 be admissible on this causation issue. A direct
2 observation of a person. That would be admissible.
3 Something that a layperson could testify about in
4 accordance with Rule 701.

5 What has to be avoided are general
6 statements that tries to characterize the whole
7 event or the postevent. That has to be avoided.

09:38 25AM

8 If you look at 404(b), it's concerned
9 with character evidence. And it talks about
10 exceptions if the evidence is offered for a
11 different purpose. And you look at the purpose
12 that are listed -- the purposes that are listed,
13 and they're not exclusive.

09:38 57AM

14 But it's motive, opportunity, intent,
15 preparation, plan, knowledge, identity, or absence
16 of mistake or accident. So the rule is concerned
17 with having general character evidence come in
18 instead of evidence that really talks about some
19 type of specific characteristic of a person's
20 conduct.

21 This testimony that the state's
22 proposing, as I see it, has nothing to do with
23 that. It has to do with what kind of physical or
24 mental effects occurred at prior sweat lodge
25 events, and that's it. It doesn't have anything to

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1 do with something that bears on somebody's intent,
2 or it cannot anyway.

3 And if it takes a limiting instruction
4 under 105, then it does. But I think if it's
5 carefully confined to the actual observations --
6 again, the foundation is there.

7 I don't think it's going to be an issue.
8 And that was discussed yesterday, Mr. Li, at the
9 pretrial conference. And my statement that so much
10 of this, essentially, is uncontested information,
11 in any event.

09:39 48AM

12 So I'm denying the motion to reconsider
13 on the terms I got that motion. It stands.

14 However, this evidence that the state is
15 proposing now didn't result from any opening of the
16 door. That's not why it's relevant. That did not
17 happen. It's just now part of the case and the
18 issues that are involved.

09:40 18AM

19 MR. LI: Your Honor, just so that we can
20 manage this -- I mean, obviously we may ask for an
21 opportunity to brief some of this. But just so
22 that we can manage this, in the next -- you know --
23 few weeks, I would ask that the state proffer what
24 these witnesses are going to say about that
25 particular issue before they say it.

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1 The problem is this: You have some very
2 emotional folks who -- some of whom have a stake in
3 this matter -- Your Honor, some of them have a very
4 serious stake in this matter, who have very
5 flamboyant ways of describing things. And that is
6 precisely -- and we've listened to these tapes and
7 spent many hours listening, as I'm sure the Court
8 has as well. And --

09:41 04AM

9 THE COURT: I know I've read a lot of
10 transcripts and interviews. I have not listened to
11 tapes.

12 MR. LI: Okay. Well, for the record, some of
13 these folks have some fairly flamboyant ways of
14 describing what they see. And what I would want
15 from the state is some proffer as to what these
16 folks are actually going to say instead of just
17 throwing them up there and waiting for us to object
18 to something.

09:41 31AM

19 This is very -- you know -- touchy stuff
20 here. And it is -- you know -- 99.9 percent of
21 what these folks actually want to say lacks
22 foundation. You know, if the Court is saying, I
23 saw somebody lying on the ground wet, that's one
24 thing.

25 You know, if the Court -- if the witness
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1 That is also true within a month, within
2 two months, within three months. People manage
3 their property and they do things and they don't
4 think about what their -- you know -- they're not
5 thinking about the sweat lodge, for instance, and
6 what might happen.

7 And the idea that somebody threw up
8 in 2008 therefore proves that it couldn't have been
9 some sort of toxin in the dirt, even though
10 everyone else thought it was or toxin in the tarp
11 or something somebody ate -- there is a logical gap
12 there, Your Honor. And it's up to -- the state has
13 to -- you know -- it's the state's burden here to
14 prove that there wasn't an intervening cause.

15 So while I understand the Court's ruling,
16 there is a -- there's a 403 objection here and a
17 relevance objection about the prior incidents.
18 Because -- you know -- the fact that something
19 happened in 2005 doesn't mean -- you know -- may
20 have no relevance whatsoever in terms of causation.

21 And I understand the Court's ruling on
22 knowledge. It may have no relevance at all in
23 terms of causation in 2009. 2008 is a year away
24 from 2009. A lot of things happen between there.
25 There may be literally no relevance at all.

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1 And yet there is a potential prejudice in
2 which, as the Court identified, there are going to
3 be -- there are going to be some emotional folks up
4 here testifying. And, as I said, there are going
5 to be a few with a stake in the matter who are
6 going to say some fairly strong things.

7 THE COURT: Well, if they're being put on the
8 stand for an ulterior purpose, that's going to be a
9 problem. They've got --

10 MR. LI: I mean, just by way of example,
11 you're going to have Mr. Mercer up there.
12 Mr. Mercer could conceivably testify, in 2008 I saw
13 it. It was horrible. There were people down,
14 et cetera. Mr. Mercer is also the person on the
15 night of the incident who says I think it was the
16 wood.

17 THE COURT: With regard to people who have
18 been to other sweat lodge events, there's already
19 been a discussion in terms of framing testimony as
20 to the 2009. The frame of reference would be what
21 they had. So that's another instance that's not
22 404(b) type information. It has to do with how
23 that person is interpreting the 2009 sweat lodge.
24 So there is evidence in that fashion.

25 These other issues you're raising,

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1 Mr. Li, those are things that are taken care of
2 through cross-examination, through other evidence.
3 You indicated you will be presenting evidence. And
4 I will watch carefully. It has to stay on line.
5 And I can't imagine there would really be very much
6 testimony along those lines because, as I've
7 indicated, there has to be solid foundation for it.
8 There has to be a real observation. It has to fit
9 within the Rule, 701.

10 MR. LI: And what I would ask, again,
11 Your Honor, is that if that's the Court's ruling,
12 that we have that discussion about the foundation
13 at least somewhat outside the presence of the jury
14 rather than just throwing it up there and then
15 having people have to jump up and down and object
16 to things.

17 THE COURT: We'll handle it in the normal
18 trial fashion. And if there is an early objection
19 and we have to break and discuss the limitations of
20 the ruling, we'll do that. But we'll be very
21 attentive to that potential problem.

22 Anything else on that issue?

23 MR. LI: No, Your Honor. Thank you.

24 MS. POLK: Your Honor, I do have a second
25 issue to raise.

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1 THE COURT: Okay.

2 MS. POLK: I do just want to briefly respond
3 to the statement by Mr. Li that the state has to
4 prove beyond a reasonable doubt that there was not
5 a supervening cause. I believe the law is that is
6 only if the defendant raises prima facie evidence
7 that there is some other cause. The state
8 obviously doesn't have to disprove any possible
9 negative out there. But I think that's an issue
10 for another day.

11 Your Honor, I want to just briefly ask
12 the Court to remind Mr. Li that the opening
13 statement is not time for argument. Yesterday he
14 spent about the last 10 minutes in, essentially,
15 what was argument. He was waiving the blue book,
16 the Constitution, and talking to the jury about
17 that is your right in the United States to believe
18 what you want to believe, and clearly had moved
19 into what is argument.

20 The purpose of the opening statement is
21 to outline for the jury where the cases are going
22 to go. And I didn't stand up and object near the
23 end of the day. But I would ask that Mr. Li be
24 reminded that this is an opening statement. This
25 is not argument.

Mina G. Hunt (928) 554-8522

1 State of Arizona v. James R. Ray, V1300CR201090049

2 Interview with Richard Haddow

3 Interviewed by (See list below)

4 Date: April 15, 2011

5

6

Present: Truc Do
Tom Kelly
Miriam Seifter
Bill Hughes, CA's Office
Sheila Polk, CA's Office
Tammy Kelly
Richard Haddow

10

11 KELLY: Okay. My tape is rolling.

12 DO: Uh, mine too. What time is it? 10:50.

13 Alright. Uhm, this is , I'm on tape. Uh, it's, uh,

14 April 15th, 2011. 10:15 p.m. This is the time --

15 POLK: a.m.

16 DO: a.m., thank you. Uh, this is the time and

17 place for the interview of Richard Haddow who is here.

18 Uhm, also present for Mr. Ray is Tom Kelly, Miriam

19 Seifter and for the State Mr. Hughes and Ms. Polk. Uhm,

20 good morning, Mr. Haddow.

21 HADDOW: Hello.

22 DO: Uhm, let me just start by, uhm, talking to you

23 about what has brought you here. You received I believe

24

-1-

Interview with Richard Haddow
State of Arizona v. James R. Ray

1 yesterday an order from, uh, Judge Warren Darrow, uh, it
2 was dated April 14th, 2011... correct?

3 HADDOW: Yes.

4 DO: And did you receive that order by e-mail.

5 HADDOW: On my fax.

6 DO: By fax? And, uh, did you read the order once
7 you got it?

8 HADDOW: Uhm, the order was read to me.

9 DO: By?

10 HADDOW: My wife --

11 DO: Alright.

12 HADDOW: -- who received the fax, I was on the,
13 out on the road.

14 DO: Okay. And when you got the order you
15 understood at that point that you were being ordered by
16 Judge Darrow to produce some documents... correct?

17 HADDOW: Yes.

18 DO: And also to make yourself available for an
19 interview?

20 HADDOW: Yes.

21 DO: And that's what we're doing here now.

22 HADDOW: Correct.

23

24

1 DO: Okay. Uhm, once you got the order and
2 realized you were going to produce documents, uh, did
3 you start that process.

4 HADDOW: Immediately.

5 DO: Okay. Could you explain for us all how you
6 started that process; who did you contact and what did
7 you do?

8 HADDOW: Uhm, my wife contacted me and let me know
9 the order came, she read the order of the telephone and
10 she began to collect, uh, my files, my dormant files,
11 going, she started going through the e-mails and
12 through, uhm, uh, file, d--, software, Word Perfect
13 files that I had for, uh, uhm, for this case and got
14 them all organized and started printing out the things
15 that you had asked and organizing and so she worked, uh,
16 until, until I left at 5:00, about 5:30.

17 DO: Okay. And when you say you left at 5:30 where
18 did you leave from?

19 HADDOW: I left from my home which is also my
20 office --

21 DO: Uh-huh.

22 HADDOW: -- and came here.

23 DO: Okay. And how far did you have to drive?
24

1 HADDOW: Just about a hundred and fifty miles.
2 DO: Alright.
3 HADDOW: And I got here about 8:00 o'clock --
4 DO: Last night.
5 HADDOW: -- last night.
6 DO: And when you say you got here at 8:00 o'clock
7 last night where are you referring to?
8 HADDOW: At, at 425 East Gurley.
9 DO: Okay. And that is the location where we're at
10 now?
11 HADDOW: Correct.
12 DO: The Law Offices of Tom Kelly?
13 HADDOW: Yes.
14 DO: Alright. Uhm, you, you had your wife start,
15 uh, compiling the documents that were responsive to the
16 order; did you begin, uh, e-mailing some of those
17 documents?
18 HADDOW: No, uhm, --
19 DO: Tell us what you did.
20 HADDOW: -- what I did is I, uhm, when I got home
21 I, I went, I reviewed what she had, it looked pretty
22 complete but w--, it was not complete so I, I went to
23 my, some of my older files and put, pulled those
24

1 together and I wanted to be, uhm, in charge of the, uhm,
2 the, of the distribution of what I had so I wanted to be
3 the, the, the focal point of distribution so she didn't
4 do anything until I gave her instructions to. Uhm, I
5 talked to Tammy on the telephone and Tammy said that if
6 I could send her electronically please do so while I was
7 gather, uh, my information, my work, work product
8 drafts, all my, uh, uh, working, working documents she
9 started do--, sending you those e-mails.

10 DO: Okay. And when you say Tammy you mean Tammy
11 Kelly?

12 HADDOW: Tammy Kelly.

13 DO: Alright. And, uhm, you have a stack of
14 documents in front of you, I'm going to say they're
15 about like five inches thick; --

16 HADDOW: Yes.

17 DO: -- uh, did you transmit all of those documents
18 by e-mail?

19 HADDOW: No.

20 DO: Explain what you did.

21 HADDOW: Uhm, the e-mails that were transferred
22 were, or the, the electronic data files that were
23 transferred were, uh, Word Perfect or maybe Acrobat

24

1 documents that I had saved and then we had sent e-mails
2 with attachments so there were, uh, some Word and
3 Acroda--, Acrobat documents and some Word, you know,
4 Word, uh, e-mail --

5 DO: Okay.

6 HADDOW: -- documents.

7 DO: And you e-mailed those to Tammy Kelly...
8 correct?

9 HADDOW: I e-mailed those to Tammy.

10 DO: Okay. And then you decided I believe to drive
11 up to Prescott with the rest of your documents?

12 HADDOW: Yeah, there was a little problem before I
13 l--, before had left, uhm, uh, Tammy Kelly called and
14 said that some of the attachments would not open --

15 DO: Alright.

16 HADDOW: -- and so she asked if I would just not,
17 uh, for the e-mails just go ahead and print out every
18 attachment and every e-mail and bring them up so it
19 delayed my departure about by a half hour to get that
20 out so, uhm, the e-mails were, were that I had sent to,
21 to your office, uhm, were then duplicated in this, this
22 file folder here.

23

24

1 DO: Okay. And when you say your office just want
2 to be clear what do you mean, who did you send it to
3 specifically?

4 HADDOW: Uhm, to I bel--, I believe it's to Tammy
5 Kelly's, uh, individual e-mail address.

6 DO: Okay. And was Tammy Kelly the only recipient
7 of that e-mail?

8 HADDOW: Yes.

9 DO: Alright. Uhm, then you, you left, uh, your
10 home which I believe is in Apache Junction?

11 HADDOW: It's, uhm, no, it's in Pinal County, the
12 mailing address is Apache Junction, --

13 DO: Okay

14 HADDOW: -- we're about five or six miles.

15 DO: And you got here about 8:00?

16 HADDOW: Yes.

17 DO: Alright. And when you got here at 8:00 was
18 Tammy Kelly here?

19 HADDOW: Yes.

20 DO: And was Mr. Kelly also here?

21 HADDOW: Yes.

22 DO: Okay. At some point did I arrive?

23 HADDOW: Yes.

24

1 DO: Do you know how long after you got here that I
2 arrived?

3 HADDOW: No.

4 DO: Okay. Uhm, uh, --

5 HADDOW: Shortly, you know within a half hour, uh,
6 --

7 DO: Sure.

8 HADDOW: -- you know, if I was guessing.

9 DO: okay. And when I arrived you were already in
10 the conference room with Mr. Kelly... correct?

11 HADDOW: Correct.

12 DO: Uhm, at any time last night, uh, when I was
13 here with Mr. Kelly and you did we engage in any
14 conversations about the substance or the facts of this
15 case?

16 HADDOW: Absolutely not.

17 DO: Okay. Uhm, did you try to ask me some
18 questions about what was going on?

19 HADDOW: I did.

20 DO: And what did I tell you?

21 HADDOW: You told me you would explain it with
22 the, with the State here to, to make it clear on my end.

23 DO: Okay.

24

1 HADDOW: For my questions.

2 DO: Okay. So just so that we're all, uh, on the
3 same page did Mr. Kelly and I, uh, tell you that we had
4 an interview scheduled and that, uh, we wanted to wait
5 for all parties to be present before we talked about any
6 of the facts or the substance of the case?

7 HADDOW: Yes, you did.

8 DO: Okay. Uhm, do you recall what time you left
9 here, uh, last night?

10 HADDOW: Just about 10:00 o'clock.

11 DO: Alright.

12 HADDOW: -- just t--, two minutes or so before
13 10:00.

14 DO: And when you left was I still here?

15 HADDOW: Yes. You were --

16 DO: Alright.

17 HADDOW: Yes.

18 DO: What was I doing when you left?

19 HADDOW: You were making copies with Tammy and,
20 uh, I don't know if it was a paralegal or an
21 administrative assistant.

22 DO: Alright. Uhm, okay. So, uhm, would it be
23 fair to say that during the time that I was here with
24

1 Tammy Kelly we were essentially copying your file and
2 making them ready to produce to the State and the other
3 parties?

4 HADDOW: Uh, exactly and putting the bates, uh,
5 bates stickers on them and stuff.

6 DO: Okay. Uhm, the other question I wanted to ask
7 you, uhm, Mr. Haddow, is, uhm, I believe that you had
8 some concerns about, you know, how you would be
9 compensated if any for the time that you obviously put
10 into driving up here, getting your files together, and
11 then the time that you are providing us here at this
12 interview... correct?

13 HADDOW: No.

14 DO: I'm sorry, go ahead.

15 HADDOW: My work product.

16 DO: Yes.

17 HADDOW: That's what I'm concerned about.

18 DO: Alright. Okay.

19 HADDOW: Those other things are incidental but the
20 major issue is my work product.

21 DO: Alright. Uhm, did you talk to Diane Troxel
22 about that?

23

24

1 HADDOW: She told me that the Judge ordered you
2 to, to determine it, --

3 DO: Alright.

4 HADDOW: -- to, to make the decision. Uhm, I got
5 a call from Diane --

6 DO: Yes.

7 HADDOW: -- and she said I will conference call
8 between your o--, between the State's office and, uh,
9 Mr. Kelly's office and you guys will come up with an
10 agreement. Uhm, Tammy, uh, Tammy Kelly said that she
11 contacted, uhm, Mr. Kelly and he would ensure that all
12 my expenses would be taken care of and I understand that
13 he might challenge how it's going to happen but he, he
14 made it clear to me that I would be, uhm, reimbursed for
15 the expenses and, and, and how he was relieved of his
16 expenses would be his issue but not mine.

17 DO: Okay. So what I want to make sure that we, we
18 have clear is whether or not as you sit here today
19 anyone has paid you any money?

20 HADDOW: Nobody has paid any money.

21 DO: Okay. So no one from Mr. Ray, uh, being Mr.
22 Kelly, myself and Ms. Seifter have paid you any monies
23 to be here?

24

1 HADDOW: Absolutely not.

2 DO: Nor has the State?

3 HADDOW: No.

4 DO: Okay. So the issue of compensation for
5 [inaudible] mileage, uhm, your lodging last night is
6 still to be taken up with the Court --

7 HADDOW: Mmm, --

8 DO: -- as you understand?

9 HADDOW: -- no.

10 DO: Would be taken up with the Court to determine
11 which of the parties?

12 HADDOW: No.

13 DO: Okay. You explain it to him 'cause I'm --

14 HADDOW: I understand that Mr. Kelly will pay all
15 my fees and any fees that he needs to get reimbursed
16 from the Court or from the State would be --

17 DO: Okay.

18 HADDOW: -- on his, his burden and not mine.

19 DO: Okay. Uhm, let me try and understand; did Mr.
20 Kelly tell you that, uh, you would not have to pay for
21 the mileage and the lodging last night?

22 HADDOW: Correct.

23

24

1 DO: Okay. Did Mr. Kelly tell you that he was
2 going to try and, uhm, resolve the issue of who was
3 going to pay for that?

4 HADDOW: No.

5 DO: Okay. So he's indicated to you that, that,
6 uh, he would cover that but seek reimbursement from the
7 Court?

8 HADDOW: Uh, yes.

9 DO: Okay. Uhm, but just so we're clear at this
10 point no one has provided you with any rem--,
11 remunerations?

12 HADDOW: Correct.

13 DO: Okay. Uhm, let me then go to the documents
14 you provided; last night, uhm, we were here --

15 POLK: Uh, can I, I just wanted to follow-up on
16 his, uh, concern was what is the work product; did you
17 discuss that with the attorneys?

18 HADDOW: No. No, uh, and what I mean no, no, uh,
19 it, it was everything; I talked to the J--, to the
20 Judge's clerk and explained explicitly what my issues
21 and concerns were. She then said that, uh, your two
22 offices were to conference with me and to resolve it and
23 then I got a call T--, Tammy, I told, expressed this to
24

1 Tammy before the teleconference happened, she was able
2 to talk to Mr. Kelly, Mr. Kelly, uh, reassured her that,
3 uhm, all the, all the financial responsibilities that I
4 would normally have with a client relationship would be,
5 would as an expert witness would be, uhm, taken care of
6 and that's how I understand [inaudible].

7 KELLY: So, so let me ask one question; you do
8 not consider yourself to be a, an expert witness for the
9 Defense?

10 HADDOW: Absolutely not.

11 KELLY: And you do not consider yourself to be an
12 expert witness for the State of Arizona?

13 HADDOW: I do not.

14 KELLY: You were previously hired by Lou Diesel
15 to represent a, uh, plaintiff in a civil lawsuit?

16 HADDOW: Yes, sir.

17 KELLY: Okay.

18 DO: Uh, and I'm going to touch back on that in
19 just a, a few moment. But, uhm, the file you brought
20 with you --

21 UNKNOWN: [Inaudible.]

22 UNKNOWN: [Inaudible] yeah, [inaudible].

23 DO: The --

24

1 POLK: Uhm, but, but I'm sorry can I finish what
2 I was asking which is what is the concern about the work
3 product and has that been resolved for you?

4 HADDOW: Uh, uhm, --

5 POLK: Is that separate from the financial
6 issue?

7 HADDOW: No, the fa--, the, the work product is
8 the financial issues, I want to be paid for all the work
9 that I did if you, uh, as, as an expert if you're going
10 use my information for your, for your project. If, uh,
11 I feel if you had on your own went to a, an expert and
12 asked them to analyze the case you would have to pay
13 them fair and reasonable fees and that's what I'm asking
14 for at this point right now.

15 DO: Let me, let me try and clarify this a little
16 bit for you and then if you have more questions we can,
17 --

18 HADDOW: Okay.

19 DO: -- we'd be happy to answer them. Uhm, the
20 order you received yesterday from Judge Warren Darrow,
21 uhm, uh, requested that you produce documents in
22 connection to whatever work you did regarding the
23 October 8th, 2009 Sweat Lodge incident.

24

1 HADDOW: Uh-huh.

2 DO: Did you understand that?

3 HADDOW: I did.

4 DO: Okay. And you also understood that the order
5 was requiring you to submit to an interview... correct?

6 HADDOW: Yes.

7 DO: Okay. Just to give you some background, Mr.
8 Haddow, uhm, you're not here as Mr. Kelly indicated as,
9 uh, an expert for the Defense... you understand that?

10 HADDOW: Uh-huh.

11 DO: You're... It's on tape so can you say yes?

12 HADDOW: Yes.

13 DO: Thank you. Uhm, you're also at some point I
14 know you had discussions with the Prosecutors about
15 possibly testifying as an expert in their case...
16 correct?

17 HADDOW: That, that, it was never, uh, it was
18 never, uh, it was just only speculative.

19 DO: I understand it was never formalized, there
20 was no retainer I understand that but you did have
21 discussions with them about your work and possibly
22 testifying as an expert?

23 HADDOW: Yes.

24

1 DO: Okay. Uhm, but ultimately they never retained
2 you... correct?

3 HADDOW: Correct.

4 DO: Okay. At issue here is, uhm, your work
5 product what you did, uh, in connection with your
6 discussions with the State and Mr. Diesel I understand
7 that you produced a report, uhm, that was, uh, dated
8 around April 2010?

9 HADDOW: Yes.

10 DO: Okay. And, uhm, I don't think you'd have any
11 reason to know this but the reason why you're here today
12 is because that particular report which was e-mailed to
13 Detective Disken dated April 29, 2010, was just produced
14 to the Defense, uhm, on April 4, 2011... did you know
15 that?

16 HADDOW: I don't have the, the dates --

17 DO: Okay.

18 HADDOW: -- in my head.

19 DO: Alright. And, uhm, the reason why we are here
20 is because of that late disclosure; uh, we have
21 questions which the Court has, uh, allowed us to, to
22 interview you about. We have questions about, uhm,
23 whatever discussions and involvement you had with the
24

1 State, Detective Disken, uh, up to the time that, uhm,
2 we received that report on April 4, 2011... okay?

3 HADDOW: Yes.

4 DO: So the main part of this interview today is
5 for me and, and for Ms. Polk if she has any questions to
6 ask you questions about that particular relationship
7 that you may or may not have had with the State and
8 Detective Disken. We may touch on your actual work, the
9 conclusions and opinions you've reached. Uhm, we may
10 not do that today, we mayn--, we may do that at a
11 different date.

12 HADDOW: Okay.

13 DO: Uhm, so I understand your concern we, you've,
14 you've put in time... right?

15 HADDOW: Correct.

16 DO: And, and you provided opinions and conclusions
17 to Mr. Diesel... correct?

18 HADDOW: Yes.

19 DO: And you provided opinions and conclusions to
20 the State... correct?

21 HADDOW: Uh, yes.

22 DO: And you haven't been paid for any of that
23 work?

24

1 HADDOW: I have been paid, not from the State, no.

2 DO: Okay. And so the, the concern that you're
3 raising today about your work product is you want to
4 know if somebody in this room decides to use your
5 opinions and conclusions whether or not you get paid and
6 who's going to pay you?

7 HADDOW: No.

8 DO: Okay.

9 HADDOW: You have my work product, you got to
10 review my work product --

11 DO: Okay.

12 HADDOW: -- you got all my insider information, --

13 DO: Uh-huh.

14 HADDOW: -- you've got all my work and energy that
15 you didn't pay for and that's the issue that I have.

16 DO: When you say you, uh, and you're talking to me
17 so I understand you're looking at me --

18 HADDOW: Yes.

19 DO: -- are you saying --

20 HADDOW: You, you, you both, you know, whoever --

21 DO: Okay.

22 HADDOW: -- somebody needs, I need to be --

23 DO: Right.

24

1 HADDOW: -- compensated in somehow shape or form
2 as an expert witness. I'm not a witness in this case.

3 KELLY: Uh, let --

4 HADDOW: And so I don't know the process; this is
5 really weird, I'm usually subpoenaed, I'm not ordered,
6 I'm, and I, I don't, I didn't bring counsel, I didn't
7 call, I didn't talk to Lou so I'm really in a, --

8 KELLY: Let, let me ask you a couple.

9 HADDOW: -- you know.

10 POLK: Uh, and actually if you don't mind 'cause
11 I, I want to clarify something that Ms. Do said.

12 HADDOW: Okay.

13 POLK: I understand from your pers--,
14 perspective you don't really know what's going on
15 because we had that one telephonic interview with you
16 and, uh, as far as I recall we had no further contact
17 with you and you, you know that we never retained you
18 but, uhm, there was an e-mail that you had sent to
19 Detective Ross Disken quite some time ago that the State
20 failed to disclose to the Defense --

21 HADDOW: Okay.

22 POLK: -- and we recently found it, we recently
23 disclosed it, the Defense then did a motion to the Court

24

1 requesting that they interview you and that they have
2 access to all of your background information that you
3 had compiled in connection with that e-mail and the
4 Court ordered that yesterday that's the order that you
5 then got, uh, and then they requested an interview of
6 you. My understanding of the purpose of this interview
7 is a little bit different from Ms. Do's. The, uh,
8 Defense believes that the information that you had
9 compiled is exculpatory meaning that it would, it, it
10 would help Mr. Ray in this criminal case and based on
11 that based on their believe that it is exculpatory then
12 that's why they are, we've got a delay in the trial,
13 they have a right to interview you to find out more
14 about what that information might be so, uhm, Ms. Do
15 said that this interview today is to find out about the
16 early part of our relationship which is true but also
17 this is an opportunity for them to find out about the
18 information, uh, the research, your conclusions so that
19 they can, uhm, determine whether or not they, that the
20 in--, information is exculpatory.

21 HADDOW: Okay.

22 DO: Okay. Well, uh, I don't want to get into an
23 argument over the legal issues here. Uhm, it is correct

24

1 that we only received those reports on April 4, 2011,
2 that we then had to move the court, uhm, for compelling
3 this information. Uhm, what I want to do with you today
4 is to discuss because part of the reason why it, it may
5 or may not be exculpatory is dependant on what you told
6 the State, when they knew it and so I'm going to ask you
7 questions about, uhm, how your relationship with
8 Detective Disken and the State began and, and whatever
9 it involved... okay?

10 HADDOW: Okay.

11 DO: And the second part of the interview is I will
12 ask you about the opinions and conclusions that you
13 reached but depending on the time and part of the reason
14 why I don't think that we're going to get into a whole
15 lot of that is as you know we were both here until 10:00
16 o'clock last night. Uhm, I haven't yet had a full
17 opportunity to really review everything, uhm, you know,
18 that you've done in this case to understand it. So I
19 just want to give you a heads up that this may be the
20 complete and entire interview and it may not just
21 depending on how far we get.

22 HADDOW: Okay.

23

24

1 DO: But, but I wanted to address, Mr. Haddow,
2 because I appreciate your concern, you, you've done work
3 obviously at the request of other folks not Mr. Ray and
4 you haven't gotten paid completely for your work and you
5 are expressing concern today as to, you know, who's
6 going to pay you for the work that you've now turned
7 over pursuant to this court order.

8 HADDOW: Yes, ma'am.

9 DO: Okay. And I don't want to ignore the I, I
10 just want to let you know that at this point Mr. Ray is
11 not, the Defense is not paying you, we've not retained
12 you as an expert witness... do you understand that?

13 HADDOW: Okay. And you, and so that, so as I
14 understood it you guys didn't follow the Judge's order
15 come to an agreement how I was to be paid?

16 DO: Well let me, let me --

17 POLK: We didn't know anything about that the,
18 the Defense --

19 HADDOW: Diane c--, Diane called both of your
20 offices.

21 DO: Let, let me, let me just jump in here.

22

23

24